Filed 11/17/09 Herklotz v. Plaza Entertainment CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

JOHN C. HERKLOTZ, Plaintiff and Appellant, v. PLAZA ENTERTAINMENT et al., Defendants and Respondents.	B207874 (Los Angeles County Super. Ct. No. BC379723)

APPEAL from a judgment of the Superior Court of Los Angeles County. Kevin C. Brazile, Judge. Affirmed.

Charles E. Ruben & Associates and Charles E. Ruben for Plaintiff and Appellant.

David S. Fisher, a Professional Corporation and David S. Fisher for Defendant and Respondent Charles Von Bernuth.

Stowell, Zeilenga, Ruth, Vaughn & Trieger and David T. Stowell for Defendant and Respondent Thomas G. Gehring.

Plaintiff John Herklotz appeals judgment entered after the court sustained defendants Thomas Gehring and Charles Von Bernuth's demurrers to his first amended complaint for contribution and indemnity on a guaranty, finding his action was barred by res judicata. Plaintiff contends that the dismissal of his claims against defendants in a related federal action is not a bar to recovery in this action because that dismissal was not on the merits. We affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

1. Plaintiff's First Amended Complaint.

Plaintiff's first amended complaint alleged that Plaza Entertainment, formed in 1996, was engaged in the commercial exploitation of films and video titles through licenses, assignments, and other transfers of rights granted by producers or other owners of the copyrights in film and video titles. Plaintiff alleged that defendants Charles Von Bernuth, Eric Parkinson, and attorney Thomas Gehring were shareholders and officers of Plaza Entertainment,[1] and the alter egos of Plaza Entertainment.

In 1996, Plaza Entertainment formed a business relationship with WRS, Inc. In late 1997, Plaintiff financed a motion picture entitled "Giant of Thunder Mountain" and wished to distribute it on video. Plaintiff believed he could sell in excess of $10 million worth of videos of the movie.

On April 29, 1998, Plaza Entertainment requested that WRS perform dubs of the video "Giant of Thunder Mountain" on a credit basis. WRS was unwilling to extend additional credit to Plaza Entertainment unless it paid its past-due balance, updated its account application, and provided additional collateral and a surety agreement. Parkinson, Gehring, and Von Bernuth told Plaintiff that Wal Mart had placed a large

---

[1] At the time plaintiff became involved with Plaza Entertainment, Gordon Granger was a shareholder of Plaza Entertainment, and wanted to terminate his relationship with it. Plaintiff agreed to purchase Granger's interest in Plaza Entertainment, 100 shares, for the sum of $100,000. In addition, Plaintiff advanced $125,000 to Plaza Entertainment and gave or sold his 100 shares to Gehring, Von Bernuth, and Parkinson. As of March 1, 1998, Plaintiff owned no stock in Plaza Entertainment.

order with Plaza Entertainment for "Giant of Thunder Mountain" videos, and that WRS would not perform dubbing services unless plaintiff executed a personal guaranty. Parkinson, Gehring and Von Bernuth represented to plaintiff that Plaza Entertainment would perform its obligations under the contract it had with WRS.

On May 6, 1998, as a result of defendants' representations, plaintiff executed a personal guaranty for any indebtedness of Plaza Entertainment to WRS. However, during July and August 1998, defendants failed to update their account application with WRS and failed to pay any sums to WRS although WRS had fulfilled the "Giant of Thunder Mountain" dubbing order.

Plaintiff later learned that in March 1998, Plaza Entertainment owed WRS more than $140,000. Further, during the period April to August 1998, WRS extended additional credit to Plaza Entertainment that was guaranteed under plaintiff's personal guaranty, and as a result plaintiff was personally obligated on behalf of Plaza Entertainment for up to $1.5 million.

Plaintiff also learned that at the time he executed the personal guaranty, Plaza Entertainment was insolvent and that Von Bernuth had loaned it approximately $245,000. By late 1998, Plaza Entertainment's liabilities exceeded its assets; it had substantial cash flow problems; and it was behind in its payments to vendors, including WRS.

In October 1998, to secure video services from WRS, defendants met with WRS and entered into a "Services Agreement." Plaintiff was not informed of these discussions or the content of the Services Agreement.

Plaintiff's operative first amended complaint asserted four claims for declaratory relief (implied contractual indemnity, reimbursement by principal to surety, and contribution pursuant to Civil Code sections 2848 and 1432) against Plaza Entertainment, Parkinson, Von Bernuth and Gehring.

2. WRS's Federal Court Action in Pennsylvania.

On October 13, 2000, WRS filed an action in the United States District Court for the Western District of Pennsylvania against plaintiff, Plaza Entertainment and its individual officers (Parkinson and Von Bernuth) for breach of contract and other relief in

an amount in excess of $1.5 million plus interest (Western Pennsylvania action) based upon WRS's performance of services for Plaza Entertainment.

Plaintiff filed a cross-complaint in the Western Pennsylvania action against Plaza Entertainment, Parkinson, and Von Bernuth for indemnity, contribution, breach of fiduciary duty, and misrepresentation arising out of plaintiff's guarantee.

WRS filed for bankruptcy on February 14, 2002, and the Western Pennsylvania action was stayed. On September 22, 2003, WRS filed a new lawsuit in the United States District Court for the Western District of Pennsylvania which was identical to the 2000 action. In July 2005, the 2000 Western Pennsylvania action was reopened, the two actions were consolidated, and all further proceedings took place in the 2000 Western Pennsylvania action.

On February 4, 2005, plaintiff filed an answer and cross-claims for indemnity, contribution, breach of fiduciary duty, and misrepresentation in the Western Pennsylvania action. On April 11 and 28, 2006, the court entered defaults in favor of WRS against Plaza Entertainment, Parkinson, and Von Bernuth for failure to appear.

On February 20, 2007, the court entered judgment against Plaza Entertainment, Parkinson and Von Bernuth in the sum of $2,584,749.03. On February 20, 2007, the court granted WRS's motion for summary judgment against plaintiff and entered judgment in the Western Pennsylvania action against plaintiff in the sum of $2,584,749.03.

3. Prosecution of Plaintiff's Federal Cross-Claim in California.

On February 27, 2007, the court granted plaintiff's oral motion to sever his cross-claim in the Western Pennsylvania action against Plaza Entertainment, Parkinson and Von Bernuth, as well as his motion to transfer venue to the Central District of California (California action).

On June 12, 2007, plaintiff filed a first amended cross-complaint in the California action against Plaza Entertainment, Parkinson, and Von Bernuth, adding Gehring as a cross-defendant on claims for breach of fiduciary duty and indemnity. Neither Plaza Entertainment nor Parkinson responded to the first amended cross-complaint.

Gehring filed a motion to dismiss the first amended cross-complaint pursuant to Federal Rules of Civil Procedure, rule 12(b)(6), arguing that plaintiff's claim was barred by the statute of limitations and that there was no basis to require Gehring to indemnify plaintiff.

Von Bernuth filed a motion to dismiss the first amended cross-complaint pursuant to Federal Rules of Civil Procedure, rule 12(b)(6), arguing that there was no basis to require Von Bernuth to indemnify plaintiff.

The court in the California action dismissed the action against Gehring and Von Bernuth. The matter is currently on appeal in the Ninth Circuit Court of Appeals.

4. Plaintiff's First Amended Complaint in the State Court Action and Demurrers.

Plaintiff's operative first amended complaint filed December 26, 2007 in the state court action stated claims for indemnity, contribution, and declaratory relief against Plaza Entertainment, Parkinson, Gehring and Von Bernuth. Plaza Entertainment and Parkinson did not appear in the action.

Gehring and Von Bernuth demurred, contending that plaintiff's action was barred by res judicata arising from the dismissal of the federal action and the applicable statute of limitations, and failed to state a basis for indemnity and contribution. Plaintiff opposed, contending that res judicata did not apply because (1) under the primary right theory, his claim for breach of fiduciary duty in the federal court action differed from his alter ego allegations in state court, and (2) the federal judgment was not on the merits because it was based upon the statute of limitations and other procedural bases that did not bar a subsequent lawsuit.

The trial court found plaintiff's case involved the same parties and facts and that the federal court had decided the case on the merits; it entered judgment dismissing the first amended cross-complaint.[2]

---

[2] The judgment did not identify the parties by name but stated, "Judgment is hereby entered dismissing the First Amended Complaint with prejudice."

DISCUSSION

Plaintiff contends that the trial court erred in (1) finding res judicata barred the first amended complaint as to Parkinson and Plaza Entertainment because there was no evidence Parkinson or Plaza Entertainment received a dismissal with prejudice in the federal action, and (2) finding res judicata barred the first amended complaint as to Gehring and Von Bernuth because the first amended complaint stated different claims as the federal action; (3) the third cause of action cured the defects of the complaint regarding satisfaction of the debt; (4) the first amended complaint is not barred by the statute of limitations; and (5) the first amended complaint stated claims for implied contractual indemnity, contribution, and declaratory relief. We conclude res judicata bars plaintiff's claims against Von Bernuth and Gehring, and affirm.

I. STANDARD OF REVIEW.

In reviewing the sufficiency of a complaint against a demurrer, we assume the truth of all facts properly pleaded and review the complaint de novo to determine whether it states facts sufficient to state a cause of action. (*Breneric Associates v. City of Del Mar* (1998) 69 Cal.App.4th 166, 180.) We accept as true the properly pleaded material factual allegations, together with facts that may be properly judicially noticed. We will reverse if the complaint alleges facts showing entitlement to relief under any possible legal theory. (*Platt v. Coldwell Banker Residential Real Estate Services* (1990) 217 Cal.App.3d 1439, 1444.) When a demurrer is sustained without leave to amend, we must also decide whether there is a reasonable possibility that the defect can be cured by amendment. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) If the complaint can be cured, the trial court has abused its discretion in sustaining without leave to amend. (*Ibid.*) The burden is on the plaintiff to show how the complaint can be amended to state a cause of action. (*Careau & Co. v. Security Pacific Business Credit, Inc*. (1990) 222 Cal.App.3d 1371, 1386.) The court may consider, as grounds for demurrer, any matter that may be judicially noticed (Code of Civ. Proc., § 430.30, subd. (a)), and may take judicial notice of the records in the pending action, or any other action pending in the same court (Evid. Code, § 452, subd. (d)).

II. RES JUDICATA BARS PLAINTIFF'S CLAIMS AGAINST VON BERNUTH AND GEHRING.

A. California Law Governs the Res Judicata Analysis.

The doctrine of claim preclusion bars a second action upon the same claim against the same parties litigated to a final judgment in a prior action. (*Burdette v. Carrier Corp.* (2008) 158 Cal.App.4th 1668, 1674.) A diversity claim resolved in a federal action is subject to the law of res judicata of the state in which the federal court sits. (*Semtek International Inc. v. Lockheed Martin Corp.* (2001) 531 U.S. 497, 508.) Here, we apply the law of California.

B. Res Judicata Bars Plaintiff's Claims in the State Court Action.

Under the doctrine of res judicata, a valid, final judgment on the merits is a bar to a subsequent action by parties or their privies on the same cause of action. (*Mycogen Corp. v. Monsanto Co*. (2002) 28 Cal.4th 888, 896.) If the plaintiff prevails in an action, the claim is merged into the judgment and may not be asserted in a subsequent lawsuit; if the defendant prevails, the judgment is a bar to further relitigation of the same cause of action. (*Id*. at pp. 896-897.) Unless the causes of action are the same, however, the first action will not bar the second. (*Branson v. Sun-Diamond Growers* (1994) 24 Cal.App.4th 327, 340.)

In California, a "cause of action" is defined by the "primary right" theory. "The most salient characteristic of a primary right is that it is indivisible: the violation of a single primary right gives rise to but a single cause of action." (*Crowley v. Katleman* (1994) 8 Cal.4th 666, 681.) A cause of action is based on the harm suffered, not the particular theory asserted by the plaintiff. (*Slater v. Blackwood* (1975) 15 Cal.3d 791, 795.) Thus, even where a complaint alleges multiple theories of liability, where only one primary right has been violated, there is but one claim for relief. (*Ibid*.) In particular, the primary right theory provides that a cause of action consists of (1) a primary right possessed by the plaintiff, (2) a corresponding duty devolving upon the defendant, and (3) a wrong done by the defendant which consists of a breach of the primary right. (*Gamble v. General Foods Corp.* (1991) 229 Cal.App.3d 893, 898.)

1. Plaza Entertainment and Parkinson.

Plaintiff asserts that because Plaza Entertainment and Parkinson's defaults were taken in the federal action, there was no judgment on the merits and therefore res judicata does not bar their claims. However, plaintiff's argument ignores the fact that Plaza Entertainment and Parkinson were not parties to the judgment of dismissal in the state court action.

The meaning and effect of a judgment is determined according to the rules governing the interpretation of writings generally. If a judgment is ambiguous, we may examine the entire record to determine its scope and effect, including the pleadings. (*Southern Pacific Pipe Lines, Inc. v. State Board of Equalization* (1993) 14 Cal.App.4th 42, 49.)

An appeal lies only from a final judgment against a party that terminates the trial court action by completely disposing of the matter in controversy. (Code Civ. Proc., § 904.1, subd. (a)(1); *Mercury Interactive Corp. v. Klein* (2007) 158 Cal.App.4th 60, 75.) A judgment may be entered against one or more of several defendants, thereby leaving the action to proceed against the remaining parties. (Code Civ. Proc., §§ 578, 579; *Oakland Raiders v. National Football League* (2001) 93 Cal.App.4th 572, 577-578.)

Here, there is nothing in the record to support the conclusion that the judgment included Plaza Entertainment and Parkinson. Although they never appeared in the action, plaintiff did not seek their default or move for a default judgment against them; they were not parties to Von Bernuth and Gehring's demurrers. Therefore, in spite of the broad language of the trial court's judgment, it did not dismiss the action against Plaza Entertainment or Parkinson. They are not parties to this appeal, and we do not address plaintiff's arguments that res judicata does not bar his claims against them.

2. Von Bernuth.

The cross-complaint in the California action asserted claims against Von Bernuth for indemnity based upon any payment plaintiff would be obligated to make to WRS as guarantor of Plaza Entertainment's indebtedness to WRS (second cause of action); breach of fiduciary duty based upon Von Bernuth's status as a shareholder, officer and director

of Plaza Entertainment and Plaza Entertainment's entry into the Services Agreement without plaintiff's knowledge, the use of receipts from "Giant of Thunder Mountain" to pay debts of Plaza Entertainment to entities other than plaintiff, and the failure to properly advertise and promote the "Giant of Thunder Mountain" (third cause of action); and fraud based upon misrepresentations concerning Wal-Mart's interest in the "Giant of Thunder Mountain" (fourth cause of action).

On the other hand, plaintiff's state court action asserted claims against Von Bernuth for declaratory relief for implied contractual indemnity based upon Von Bernuth's promise to pay WRS fully and promptly when such payments were due (first cause of action); declaratory relief for reimbursement by a surety against the principal based upon any payment plaintiff would be obligated to make to WRS as guarantor of Plaza Entertainment's indebtedness to WRS (second cause of action); declaratory relief for contribution pursuant to Civil Code section 2848[3] based upon any payment plaintiff would be obligated to make to WRS as guarantor of Plaza Entertainment's indebtedness to WRS (third cause of action); and declaratory relief pursuant to Civil Code section 1432[4] for any payment plaintiff would be obligated to make to WRS as guarantor of Plaza Entertainment's indebtedness to WRS (fourth cause of action). The state court first amended complaint also asserted that Von Bernuth was the alter ego of Plaza Entertainment.

Claims for indemnity, contribution and reimbursement by a surety against a principal are equitable claims that arise where a guarantor or co-obligor satisfies an obligation to a third party. (13 Witkin, *Summary of California Law* (10th ed. 2005)

---

[3] Civil Code section 2848 provides, "A surety, upon satisfying the obligation of the principal, is entitled to enforce every remedy which the creditor then has against the principal to the extent of reimbursing what he has expended, and also to require all his co-sureties to contribute thereto, without regard to the order of time in which they became such."

[4] Civil Code section 1432 provides, "Except as provided in Section 877 of the Code of Civil Procedure, a party to a joint, or joint and several obligation, who satisfies more than his share of the claim against all, may require a proportionate contribution from all the parties joined with him."

Equity, § 178, p. 506.) Where a surety has paid the principal's debt, the surety may sue the principal directly and recover what the surety has disbursed. (*Berrington v. Williams* (1966) 244 Cal.App.2d 130, 134.) Where several parties are jointly and severally liable, and one has paid more than his or her share, that party may seek contribution from the other co-obligors. (Civ. Code, § 1432; *Hurlbut v. Quigley* (1919) 180 Cal. 265, 270.)

A comparison of the two actions against Von Bernuth establishes that they are based upon the same primary right, namely, plaintiff's rights as a surety and/or co-obligor on the debt to WRS to be reimbursed by the principals or for contribution from the other alleged co-obligors of Plaza Entertainment's debt to WRS. Plaintiff makes several arguments to avoid the application of res judicata to the assertion of this same primary right in the state court action, all of which are without merit.

First, plaintiff's attempts to characterize his claims as ones for declaratory relief fail to distinguish them from the claims asserted in the federal action. Plaintiff styled his claims in this manner to benefit from the rule that declaratory judgments are not res judicata as to all matters; they are only res judicata as to the matters declared. (*Aerojet-General Corp. v. American Excess Ins. Co.* (2002) 97 Cal.App.4th 387, 402-403.) The rule is based upon Code of Civil Procedure section 1060's provision that a party may bring an action for a declaration of "'Rights or duties, whether or not further relief is or could be claimed at the time,'" thereby reserving the right to bring a claim that was not, but could have been raised. (*Id.* at p. 402.) However, the rule does not apply here because it only applies if the first, rather than the second, action is one for declaratory relief.

Second, plaintiff fails in his attempts to distinguish the state court action from the federal action by asserting the state court action seeks recovery based upon a theory of alter ego liability, which was not asserted in the federal action. Alter ego here provides an additional means of recovery for the same primary right, namely, the right of a surety or guarantor to seek indemnity and contribution from the principal and co-obligors. Further, because both the federal and state actions involved the same parties, alter ego was a theory of recovery that could have been, but was not, stated in the federal action

and is therefore barred by res judicata. (*Aerojet-General Corp. v. American Excess Ins. Co., supra,* 97 Cal.App.4th at p. 402.)

Finally, plaintiff argues that his restatement of the third cause of action to change the remedy cures any problems that may have existed with the federal first amended cross-complaint. Von Bernuth challenged the claim on the basis plaintiff failed to allege he had satisfied the obligation of another; plaintiff therefore corrected the state court complaint by framing the action as one for declaratory relief because such a claim requires no such allegation that the debt has been satisfied. As discussed above, because the same primary right is asserted, the manner in which the pleading is styled or the remedy described does not alter the fact that res judicata bars plaintiff's claims.

3. Gehring.

Plaintiff's claims against Gehring in the federal action were for breach of fiduciary duty based upon Gehring's status as a shareholder, officer and director of Plaza Entertainment and Gehring's status as a lawyer and provider of legal services to Plaza Entertainment; plaintiff alleged that Gehring misrepresented the extent of debt owed to WRS and permitted Plaza Entertainment to increase its debt load (fifth cause of action). Plaintiff also asserted a claim for indemnification against Gehring based upon plaintiff's obligation to pay on the guaranty of Plaza Entertainment's debt to WRS (sixth cause of action).

On the other hand, plaintiff's state court action asserted claims against Gehring for declaratory relief for implied contractual indemnity based upon Von Bernuth's promise to pay WRS fully and promptly when such payments were due (first cause of action); declaratory relief for reimbursement by a surety against the principal based upon any payment plaintiff would be obligated to make to WRS as guarantor of Plaza Entertainment's indebtedness to WRS (second cause of action); and declaratory relief pursuant to Civil Code section 1432 for any payment plaintiff would be obligated to make to WRS as guarantor of Plaza Entertainment's indebtedness to WRS (fourth cause of action). Plaintiff also alleged that Gehring was the alter ego of Plaza Entertainment.

For the same reasons discussed above in relation to plaintiff's claims against Von Bernuth, the claims against Gehring are also barred.[5]

DISPOSITION

The judgment of the superior court is affirmed. Respondents are to recover their costs on appeal.

ZELON, J.

We concur:

WOODS, Acting P. J.

JACKSON, J.

[5] Because we conclude plaintiff's complaint is barred by res judicata, we need not consider whether his claims properly stated claims for relief on the substantive issues.